

FILED

AUG 14 2003

U.S. BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

Case No. 03-30792-DHW

Chapter 13

IVEY JONES,

Debtor.

OPINION ON OBJECTION TO CONFIRMATION

Colonial Bank filed an objection to confirmation of the debtor's chapter 13 plan.

The objection came on for an evidentiary hearing on July 28, 2003. Vonda S. McLeod appeared for the debtor, and Britt B. Griggs appeared for Colonial Bank. The chapter 13 trustee appeared but took no part in the hearing.

Jurisdiction

The court has jurisdiction of the objection pursuant to 28 U.S.C. § 1334. An objection to confirmation is a core proceeding under 28 U.S.C. § 157(b)(2)(L); therefore, the court's jurisdiction extends to the entry of final orders and judgments.

Findings of Fact

The debtor borrowed \$16,795 from Colonial Bank on August 22, 2000 to purchase a 2000 Mercury Grand Marquis. Colonial Bank took a security interest in the car.

At the time of the loan, the debtor operated a Ford dealership in Opp, Alabama. Over the years, the debtor had done business with Colonial Bank

both in connection with the dealership and personally.¹ The debtor purchased the Mercury for her personal use and not for inventory of the dealership.²

The debtor told representatives of Colonial Bank that she would submit a title application to the State of Alabama listing the bank as the lienholder on the vehicle. The debtor mailed a completed application to Colonial Bank but failed to deliver the application to the State of Alabama. The debtor attributes the failure to her husband's terminal illness and mere procrastination.

The debtor sold the Mercury to a third party in April or May of 2001 for \$15,000. She did not remit the sale proceeds to Colonial Bank. Instead, she used the money to defray operating expenses of the dealership, which by then was struggling financially. At the time the Mercury was sold, the debtor was being hounded by creditors including Ford Motor Credit and unpaid dealership employees. The debtor closed the dealership in June 2001.

After selling the Mercury, the debtor continued to make monthly payments on the vehicle to Colonial Bank. In all, the debtor made 24 monthly installments on the Mercury with the last installment in October 2002. Colonial Bank did not become aware that the debtor had sold the Mercury until August or September 2002.

The debtor filed a chapter 13 petition for relief on March 12, 2003. The debtor filed a plan proposing to treat the claim of Colonial Bank as

¹ Colonial Bank had previously floor-planned the inventory of the debtor's dealership. The dealership paid off the Colonial Bank floor-plan in 2000, and Ford Motor Credit floor-planned the dealership inventory thereafter. Hence, at the time of the instant loan, Colonial Bank was not a creditor of the debtor's automobile dealership.

² She chose to finance the Mercury separately from the dealership floor plan because she wanted to use the car personally and avoid the problems that would arise were the vehicle absent from the dealership lot during an inventory inspection.

unsecured. The plan proposes 13% payment on allowed unsecured claims over a five-year term. The \$11,686 claim of Colonial Bank is approximately 1½% of the debtor's \$706,252 total indebtedness.

Colonial Bank filed an objection to confirmation contending that the plan is not proposed in good faith.

Conclusions of Law

In order for a chapter 13 plan to be confirmed it must have been proposed in good faith.³

The phrase "good faith" is not particularly defined by the statute. Courts in this circuit are instructed to consider a number of specific but non-exclusive factors in making "good faith" determinations. See *Kitchens v. Georgia R.R. Bank & Trust Co. (In re Kitchens)*, 702 F.2d 885 (11th Cir. 1983).⁴ Good faith is not determined by any one factor but from the

³ 11 U.S.C. § 1325(a) provides in pertinent part as follows: " Except as provided in subsection (b), the court shall confirm a plan if . . . the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3).

⁴ The *Kitchens* court enumerated the following factors:

1. the amount of the debtor's income from all sources;
2. the living expenses of the debtor and her dependents;
3. the amount of attorney's fees;
4. the probable or expected duration of the chapter 13 plan;
5. the motivations of the debtor and her sincerity in seeking chapter 13 relief;
6. the debtor's degree of effort;
7. the debtor's earning ability and the likelihood of earnings fluctuations;
8. special circumstances such as inordinate medical expenses;
9. frequency with which bankruptcy relief is sought;
10. circumstances under which the debtor has contracted her debts and her demonstrated bona fides, or lack thereof in dealing with her creditors;
11. the burden the plan's administration places upon the trustee;
12. the types of debts to be discharged and whether those debts would be dischargeable under chapter 7;

totality of the circumstances surrounding an individual case. *Id.*

The case at bar implicates a couple of the *Kitchens* factors. Of greatest concern is the debtor's sincerity in dealing with Colonial Bank. It is undisputed that the debtor told Colonial Bank that she would complete and deliver the title application to the State of Alabama and that she did not do so. Although the debtor contends that this omission was a result of her husband's illness and her own procrastination, the court is troubled by the fact that the debtor had the time and inclination to furnish Colonial Bank with a completed title application but had neither the time nor inclination to deliver one to the State. An inference could easily be drawn that the debtor intentionally lured Colonial Bank into complacency by creating the impression that the title application had been delivered to the State.

Assuming, though, that the debtor's explanation of her failure to deliver the title application to the state is accepted as mitigating, there is further reason to suspect a lack of bona fides in the debtor's dealings with Colonial Bank. Not only did the debtor sell the automobile to a third party with full knowledge of Colonial Bank's security interest (unperfected though it was), she neither advised the bank of the sale nor remitted the sale proceeds. It must be remembered that this particular debtor operated an automobile dealership. There can be little doubt that she comprehended both the rights of the bank and the consequences of her actions. The totality of these facts leads the court to conclude that the debtor lacked bona fides and candor in her dealings with this creditor.

Another of the *Kitchens* factors implicated here is whether this debt would be dischargeable were this case one under chapter 7 instead of chapter 13. The intentional conversion of collateral may form the basis for nondischargeability of a debt in a chapter 7 case.

11 U.S.C. § 523(a) provides as follows: "A discharge under section

13. the extent to which claims are modified and the extent of preferential treatment among classes.

727 . . . does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6).

Willful and malicious injury "does not follow as of course from every act of conversion, without reference to the circumstances." *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 332, 55 S. Ct. 151, 153, 79 L. Ed. 393 (1934). "There may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed." *Id.*; see also *Wolfson v. Equine Capital Corporation*, 56 F.3d 52 (11th Cir. 1995).

Nevertheless, under the circumstances of this case, the court must conclude that the debtor's conversion of the bank's collateral was willful and malicious and therefore nondischargeable in a case under chapter 7. As previously mentioned, the debtor operated an automobile dealership. Because of her peculiar experience in the automobile industry, the court would be naïve to conclude that she lacked the sophistication to appreciate that her actions constituted a tort.

Further, there is no evidence that Colonial Bank, through its course of dealing with this debtor, led her to believe that she could dispose of the collateral and retain the proceeds. While it is true that the bank at one time floor-planned the dealership's inventory, the debtor was not under the illusion that the Mercury was part of the dealership's inventory. To the contrary, the debtor intentionally financed the vehicle separately from the vehicles financed for the dealership.

For the above reasons, the court concludes that under the circumstances presented here, the debtor's sale of Colonial Bank's collateral to a third party and the retention of the sales proceeds constituted a willful and malicious injury to Colonial Bank's property. Hence, Colonial Bank's claim would be nondischargeable were this case one under chapter 7.

Conclusion

Considering the totality of the circumstances, the court concludes that the debtor has not proposed her plan in good faith. Accordingly, a separate order sustaining Colonial Bank's objection to confirmation will enter.

Done this the 14th day of August, 2003.

/s/ Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Debtor

Vonda S. McLeod, Attorney for Debtor

Britt B. Griggs, Attorney for Creditor

Curtis C. Reding, Chapter 13 Trustee